Nos. 162, 163, 164,

In the Supreme Court of the United States

OCTOBER TERM, 1955

EAST TEXAS MOTOR FREIGHT LINES, INC., ET AL.,
APPELLANTS
v.
FROZEN FOOD EXPRESS, THE SECRETARY OF AGRICULTURE, ET AL.

INTERSTATE COMMERCE COMMISSION, APPELLANT
v.
FROZEN FOOD EXPRESS, ET AL.

AKRON, CANTON & YOUNGSTOWN R. R. CO., ET AL.,
APPELLANTS
v.
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

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OPINIONS BELOW

The opinion of the district court (R. 50–60) is reported at 128 F. Supp. 374. The report of the Interstate Commerce Commission (R. 38–48) appears in 62 M. C. C. 646.

In July 1954 the Commission filed a report in which it concluded that fresh and frozen meats and dressed poultry are not within the Section 203 (b) (6) exemption (R. 38–47). Following entry of an order prohibiting the transportation found to be unlawful (R. 47–48), Frozen Food brought the present suit to set aside the Commission's order (R. 1–6). The answer filed by the United States, a statutory defendant, supported Frozen Food's attack upon the order in so far as it applied to fresh and frozen meats and dressed poultry (R. 29–31), and the Secretary of Agriculture, who intervened as a party plaintiff,[1] alleged that the order was invalid in these respects (R. 33–37). The three complainants before the Commission, three associations of motor carriers, and certain Class I railroads intervened as parties defendant (R. 62, 68).

The district court unanimously held that fresh dressed poultry and frozen dressed poultry are "agricultural commodities", as these words are used in Section 203 (b) (6), and that the process-

[1] Section 201 of the Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U. S. C. 1291), authorizes the Secretary of Agriculture to "make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same", with all of the "rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination." Similar authority is also conferred on the Secretary by Section 203 (j) of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088–1089, 7 U. S. C. 1622).

ing which they undergo does not make them "manufactured products thereof" (R. 57–59). The court also held, with one judge dissenting, that the exemption given by the section does not apply to fresh and frozen meats (R. 58–60),[2] but this determination has not been appealed.

The Commission's report set forth the steps taken when a chicken, duck or turkey is to be marketed as dressed poultry. While the grower sometimes does the killing and processing, poultry usually is shipped alive to a processing plant. It is there placed on an endless chain which carries it through the various stages of "killing, picking, pinning, singeing, cropping and venting, washing, chilling, eviscerating, packaging, and freezing." Picking is done both by machinery and by hand. Chilling involves submersion in tanks of ice water long enough to remove all body heat. In the eviscerating process the viscera are removed, and the liver, heart, and gizzard are cleaned and replaced in the carcass. After that, the poultry is wrapped and packed for shipment. Poultry which is to be frozen is placed in a refrigerated room in which the temperature is

[2] The court noted that Section 203 (b) (6) provides separate exemptions for "ordinary livestock" and "agricultural commodities"; that animals which constitute "ordinary livestock" are therefore not within the "agricultural commodities" exemption; and that animals which, when alive, are not "agricultural commodities" do not become such upon being slaughtered and severed into various cuts of beef or pork (R. 58–59).

maintained at minus 40° Fahrenheit, and, following quick-freezing, the birds are placed in cold storage until ready for shipment. (R. 42–43.)

It is the position of the Secretary of Agriculture, in which the United States joins, that the order of the Commission directing Frozen Food to cease transportation of fresh and frozen dressed poultry is invalid, and that the judgment of the district court setting aside this provision of the Commission's order should be affirmed.

SUMMARY OF ARGUMENT

Section 203 (b) (6) exempts from the motor-carrier requirements of the Act (other than those related to safety) motor vehicles used in carrying "agricultural commodities (not including manufactured products thereof)". Products of the farm, such as poultry, are "agricultural commodities" and remain such until converted into "manufactured" products. A chicken, after slaughter and removal of its feathers and entrails, remains a chicken, and it is bought and sold as such, not as a "manufactured" article.

A. The legislative history of the section shows that it was the clear intent of Congress that the exemption provided for agricultural commodities should include those which had been processed without making any real change in their identity or beneficial uses, and that products so processed should not be deemed within the parenthetical limitation, "not including manufactured products

thereof." The statutory provisions and legislative history also establish that the exemption granted motor vehicles carrying processed agricultural commodities applies whether the processing was on the farm or in a commercial plant, and whether the vehicles are farmer operated or commercially operated.

B. Section 203 (b) (6) uses the word "manufactured" in its ordinary sense and this word, as defined by this Court in decisions construing other statutes, means the creation of a new and different article having a distinctive name, character, and use from what it had before. Plainly, therefore, dressed poultry is not a "manufactured" product within the meaning of the section. Moreover, the Commission has ruled that milk, after pasteurizing, homogenizing, adding vitamin concentrates, standardizing, and bottling, is not a "manufactured" product excluded from the "agricultural" exemption, because such processing does not materially change its "basic character" or its original "beneficial uses". We submit that the processing which dressed poultry has undergone likewise does not materially change its character or its beneficial use—its value as an article of food. It is, therefore, like pasteurized milk, an exempted agricultural commodity.

C. The ruling made by the Commission in the present case does not conclusively determine that dressed poultry is not within the "agricultural" exemption. The weight to be given to an admin-

istrative determination depends upon the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore v. Swift & Co.*, 323 U. S. 134, 140. The Commission's ruling, so tested, is far from persuasive. It was grounded, not on the words of the statute or its legislative history, but on the Commission's concept of what it would have been "logical" for Congress to have provided. Furthermore, the Commision's view of what would be logical rests on the erroneous premise that the statutory provisions pertinent to the exemption of meats and those pertinent to exemption of dressed poultry are parallel. In addition, administrative interpretation provides, in this case, no reliable index to the meaning of the statute. In the Commission's occasional prior rulings on the application of Section 203 (b) (6) to dressed poultry, there has been no consistency in reasoning, but rather abandonment of one vulnerable position after another.

ARGUMENT

The exemption of motor vehicles used in carrying "agricultural commodities (not including manufactured products thereof)", given by Section 203 (b) (6) of the Interstate Commerce Act, covers vehicles used in carrying fresh or frozen dressed poultry

In the present appeals, the controlling question is whether dressed poultry is a "manufactured" product as that word is used in Section 203

(b) (6). Products of the farm, such as poultry, concededly are "agricultural commodities" within the exemption given by the section, and they remain such until converted into a "manufactured" product. The ruling of the Commission which is in issue is that poultry, upon being slaughtered, becomes a manufactured product. This is the necessary effect of the Commission's conclusion that poultry "other than that alive" is not an agricultural commodity within the meaning of the section (R. 13). The apparent theory is that conversion of a "live inedible fowl" into a "dead edible fowl" constitutes "manufacture." See *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, 546.

Chickens, ducks, turkeys, and other poultry do not change into something else upon being slaughtered. Neither do they change into something else when "dressed", that is, when the inedible feathers and viscera are removed. The birds alive have value as an article of food, and this is the value which they have, and the purpose for which they are purchased, after being plucked and cleaned. Dressed poultry is bought as a chicken, duck, or turkey, not as a different, much less a manufactured, product. "Surely the Thanksgiving turkey which the farmer's wife so carefully stuffs and places in the oven is not a manufactured article." Commissioner Lee concurring in part in the *Determination* case, 52 M. C. C. at 561–562.

We propose to show (1) that the legislative history of Section 203 (b) (6) establishes that processing of the kind and purpose involved in preparing poultry for marketing as dressed poultry does not make an agricultural commodity a "manufactured" product, excluded from the exemption granted by the section; (2) that such processing is not within the ordinary and accepted meaning of the word "manufactured", or within its meaning as Section 203 (b) (6) has been administratively construed; (3) and that the Commission's ruling that dressed poultry is not under the Section 203 (b) (6) exemption is not determinative, or even persuasive, of the scope and application of the section.

A. The legislative history of Section 203 (b) (6) establishes that farm products, processed merely to the extent of rendering them readily marketable, remain within the exemption given "agricultural commodities", and are not "manufactured" products excluded from such exemption

Congress passed the Motor Carrier Act, 1935, subjecting interstate motor-carrier operations to regulation because the industry then was "unstable economically, dominated by ease of competitive entry and a fluid rate picture", in order to "preserve the motor transportation system from over-competition". *American Trucking Assns. v. United States*, 344 U. S. 298, 312–313. But Congress also intended that this regulation should not take from the farmers of the country the advantage of low-cost motor transportation. In the course of congressional consideration, Congress adopted or expanded exemptions from the

Act designed to benefit the agricultural economy, thereby progressively broadening the scope of these exemptions.

As passed by the Senate, the only pertinent exemption in the bill (S. 1629) which became the Motor Carrier Act was of "casual, occasional, or reciprocal transportation" of passengers or property by a person not engaged in motor transportation as a "regular occupation" (79 Cong. Rec. 5660, 5737).[3] Senator Wheeler, who was in charge of the bill, stated that its purpose was "to exempt the operations of farmers and others who occasionally haul for hire" (*id.*, 5652).

This exemption was retained when the House Committee on Interstate and Foreign Commerce favorably reported the Senate bill with certain amendments, but the Committee added an exemption for "motor vehicles used exclusively in carrying livestock and unprocessed agricultural products" (79 Cong. Rec. 12,205, 12,219–20). In debate, doubt was expressed as to whether pasteurized milk and cream would be within this exemption (*id.*, 12,205), and pointed reference was made to the opposition by farmers to the proposed regulation (*id.*; 12,217).[4] An amend-

[3] The exemption was enacted as subparagraph (9) of Section 203 (b). 49 Stat. 546.

[4] Mr. TRUAX. The ordinary farmer is opposed to the bill.

Mr. PIERCE. Absolutely, from beginning to end. This bill contains more dynamite for the Members on this side than anything we have had up this session. You put this over and put this bill into effect, and many Members will lose their seats on this very issue.

ment was then offered to strike out the words "unprocessed agricultural products" and substitute "agricultural commodities not including manufactured products thereof", with the explanation that the House Committee had not intended to exclude pasteurized milk or ginned cotton from the exemption, and therefore, "to meet the views of many Members", it proposed that only "manufactured products" be excluded from the exemption (*id.*, 12,220). It was also stated that under this language baled cotton and cotton seed "transported from the ginneries to the market or to a public warehouse would be exempt" (*ibid.*). Following such explanation, the exemption, which became subparagraph (6) of Section 203 (b), was adopted (*ibid.*).[5] The Interstate Commerce Commission has recognized that this change significantly broadened the exemption given by the section. *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, 523.

The House, in addition to adopting this expanded "agricultural" exemption, provided for exemption of "motor vehicles controlled and operated by any farmer and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm" (79 Cong. Rec. 12,220). See 49 U. S. C. 303 (b)(4a).

[5] A further amendment brought "fish, including shell fish", under the exemption (*ibid.*).

Before final passage of the bill by the House, the "agricultural" exemption was strengthened by making it "absolute rather than discretionary." As proposed by the House Committee, the Interstate Commerce Commission had power to nullify this exemption if the Commission at any time found that its application did not serve to effectuate the national transportation policy declared in Section 202 of the Act (79 Cong. Rec. 12,219–20, 12,225).[6] After it had been stated that "it has never been the intention of anybody who has spoken here to give the Interstate Commerce Commission any discretion with respect to farm products" (*id.*, 12,225), the "agricultural" exemption was included among those granted in absolute terms (*id.*, 12,226).

The bill, as thus amended, was passed by both branches of Congress (79 Cong. Rec. 12,279, 12,460).

We submit that the following clearly appears from the various exemptions written into the Act, and from the intent of Congress with respect to the scope of the exemption conferred by Section 203 (b) (6) as shown by changes made in the ex-

[6] As proposed by the House Committee, the Act's major regulatory provisions were not to apply to vehicles carrying agricultural commodities "unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202" (*id.*, 12,219–20).

emption as originally proposed:[7] (1) Such exemption applies to motor vehicles carrying agricultural commodities whether the vehicles are operated by farmers or commercial truckers.[8] (2) It applies to such commodities after having been processed either on the farm or in a commercial plant. (3) It applies to motor transportation of a processed agricultural commodity where the processing, as in pasteurization of milk or ginning of cotton, has merely put it in a form in which it can obtain ready consumer acceptance. Congress thus tacitly recognized that the price which the farmer obtains for his product is affected by the cost of transporting it to consuming markets,

[7] As to the significance of amendments to a bill, prior to its enactment, involving rejection of the original proposal, see *United States* v. *Pfitsch*, 256 U. S. 547, 551–552; *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, 155; Jones, *Extrinsic Aids in the Federal Courts*, 25 Iowa Law Rev. 737, 754 ("The alterations made in a bill during the course of its passage normally reflect a deliberate choice of the legislators as to the proper statutory direction."); Landis, *A Note on "Statutory Interpretation,"* 43 Harv. Law Rev. 886, 889 ("Successive drafts of the same act do not simply succeed each other as isolated phenomena, but the substitution of one for another necessarily involves an element of choice often leaving little doubt as to the reasons governing such a choice."). See also *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 260.

[8] The exemption given by subparagraph (4a) of Section 203 (b) completely covers farmer-controlled and farmer-operated vehicles when used in carrying "agricultural commodities and products thereof." Furthermore, pasteurized milk and cottonseed concededly are within the exemption given by Section 203 (b) (6), but pasteurizing is customarily done at dairies and farmers sell the bulk of their cottonseed to the ginners. *Determination* case, *supra*, pp. 523–524.

whether the product is transported in its raw state or after processing which puts it in a readily marketable form.

Congressional intent that the exemption given by Section 203 (b) (6) should have a broad scope is further shown by the later adoption of certain other amendments to the section designed to increase its coverage, and by failure to act upon various proposals to narrow its scope.

As it was enacted in 1935, Section 203 (b) (6) exempted motor vehicles "used exclusively" in carrying agricultural commodities. The Act of June 29, 1938, 52 Stat. 1237, struck out the word "exclusively", and added at the end of the exemption "if such motor vehicles are not used in carrying any other property, or passengers, for compensation."[9] The Act of September 18, 1940, 54 Stat. 920, 921, inserted "ordinary" preceding "livestock", so as to make applicable the definition of "ordinary livestock" in Section 20 (11) of the Act (S. Rep. 433, 76th Cong. 1st Sess. p. 7).[9a] The Act of July 9, 1952, 66 Stat. 479,

[9] This change manifested the congressional purpose to exempt motor vehicles while carrying agricultural commodities even though at other times the same vehicles carried non-exempt commodities. *Interstate Commerce Commission* v. *Service Trucking Co., Inc.*, 186 F. 2d 400, 401–403 (C. A. 3); *Interstate Commerce Commission* v. *Dunn*, 166 F. 2d 116, 117–118 (C. A. 5).

[9a] Section 20 (11) provides, *inter alia*: "The term 'ordinary livestock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses," 49 U. S. C. 20 (11).

changed the words "agricultural commodities" to "agricultural (including horticultural) commodities", in order to correct the Commission's ruling in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, 555, that nursery stock, flowers, and bulbs are not within the exemption.

On the other hand, the following proposals to narrow the "agricultural" exemption were presented to Congress but not acted upon: In 1940 the Interstate Commerce Commission proposed to Congress that Section 203 (b) (6) be amended so as to restrict the exemption to "the first movement from the point of production to the point of sale by the producer, or to the point of manufacture or transshipment."[10] A bill introduced in 1943 would have limited the exemption to transportation "by the producers of such property or by private carriers of property by motor vehicle if not for compensation" (S. 1148, 78th Cong., 1st Sess.). A bill introduced in 1950 would have limited the exemption to "ordinary livestock, live poultry, and other agricultural

[10] S. 2009, 76th Cong., 2d Sess. See Hearings before the Subcommittee of the Senate Committee on Interstate and Foreign Commerce, pursuant to S. Res. 50, *Study of Domestic Land and Water Transportation*, 81st Cong., 2d Sess., p. 823.

In 1952 this same restriction was incorporated in a proposed substitute for a bill (S. 2357, 82d Cong., 2d Sess.) to amend Section 203 (b) (6). See Hearings before Senate Committee on Interstate and Foreign Commerce on Bills Relative to Domestic Land and Water Transportation, 82d Cong., 2d Sess., p. 372.

commodities (not including the products of slaughter, nor preserved, frozen, or manufactured products), and fish (including shellfish but not including preserved, frozen, processed or manufactured products)."[11]

Appendix C of appellants' brief in No. 162 sets forth an excerpt from the "Progress Report" appearing in S. Rep. 1039, 82nd Cong., 1st Sess., but the views and conclusions incorporated in this report have not been endorsed by any congressional committee.[12]

B. Under the ordinary meaning of the word "manufactured", as it is used in Section 203 (b) (6), the processing incident to preparing poultry for sale as dressed poultry does not make it a "manufactured" product

The word "manufactured" is not used in Section 203 (b) (6) in a technical sense and it therefore must be given its common, ordinary meaning, and the Commission has so ruled (*Determination* case, *supra*, p. 517).[13] Under that meaning as defined in decisions of this Court

[11] H. R. 7547, 81st Cong., 2d Sess. See Hearings pursuant to S. Res. 50, 81st Cong., 2d Sess., *supra*, p. 825.

[12] The report's "Foreword" states that the Senate Committee "has authorized with reservations the issuance of this progress report by Senator Bricker"; and that the conclusions and recommendations incorporated in the report "represent the views of the authors and have neither been approved nor disapproved by the Senate Committee on Interstate and Foreign Commerce."

[13] In the absence of some contrary indication, it must be assumed that the words of a statute are used in their "ordinary meaning." *Jones* v. *Liberty Glass Co.*, 332 U. S. 524, 531.

construing other statutes, dressed poultry clearly is not a "manufactured" product.

Hartranft v. *Wiegmann*, 121 U. S. 609, held that shells whose outer layer had been removed by acid and a further layer by grinding by an emery wheel, and on some of which inscriptions had been etched, and which were to be sold as ornaments, came within the tariff classification of shells "not manufactured". This Court said that they "were still shells", that they had not been manufactured "into a new and different article, having a distinctive name, character or use from that of a shell", and that application of hand or mechanical labor to an article does not necessarily make it "manufactured", just as cleaning and ginning cotton "does not make the resulting cotton a manufacture of cotton." 121 U. S. 615.

In *Anheuser-Busch Brewing Assn.* v. *United States*, 207 U. S. 556, an importer of corks washed and steamed them to remove all impurities, bathed them in a solution to close all crevices and to prevent bottled beer from acquiring a cork taste, and used the corks for bottling exported beer. The Court held that these corks were not articles "manufactured" in the United States of imported materials, and that the importer was therefore not entitled to a drawback of the import duties which he had paid. The Court said (p. 562):

> Manufacture implies a change, but every change is not manufacture, * * *. * * * There must be transformation; a new and

different article must emerge, "having a distinctive name, character or use."

American Fruit Growers, Inc. v. *Brogdex Co.*, 283 U. S. 1, involved the issue whether a product patent, claimed as to fresh citrus fruit the rind of which had been impregnated by a solution rendering the fruit resistant to decay, constituted discovery of a "manufacture". The court below had held that the product claimed was a combination of the natural fruit and the solution carried in its rind, and that such product "is not found in nature and is thus an article of manufacture," 283 U. S. 11. This Court, relying on the dictionary definition of "manufacture" and on the *Hartranft* and *Anheuser-Busch* cases, reversed. It said that addition of the solution does not produce an article possessing "a new or distinctive form, quality, or property", and does not change the "name, appearance, or general character of the fruit", which remains a fresh orange "as theretofore". *Id.*, 11–12.

See also *United States* v. *Dudley*, 174 U. S. 670, 672–673; *United States* v. *Potts*, 5 Cranch 284, 286–287; *Interstate Commerce Commission* v. *Yeary Transfer Co., Inc.*, 202 F. 2d 151 (C. A. 6); *Prentice* v. *City of Richmond* (Appendix, *infra*, p. 31).

A dressed chicken is therefore not a "manufactured" product—it is the same in name, character, and use as when it was alive and befeathered. There is no greater change in the chicken than

there is between cotton growing in the patch and cotton ginned and baled, or between milk as taken from the cow and milk pasteurized, homogenized, enriched, and bottled. Yet under Section 203 (b) (6) ginned cotton and pasteurized milk are "agricultural commodities", not "manufactured products", as recognized by the Commission (*Determination* case, *supra,* p. 517, 523, 551) and as clearly established by the section's legislative history (*supra,* pp. 11–12).

The processing undergone by milk and cream without making it "manufactured" involves at least as great a change and is at least as commercial as the processing undergone by dressed poultry. Milk processing includes pasteurizing, homogenizing, adding vitamin concentrates, standardizing, and bottling. *Determination* case, *supra,* p. 549. Pasteurization is a process by which milk is heated to a sufficiently high temperature and for a sufficient time to kill the pathogenic organisms present in it (*ibid.*). Homogenization reduces the size of the fat globules in milk and cream, and this process, like pasteurization, is done mainly in dairies, very seldom on the farm (*id.*, p. 550). Standardization is the practice of combining cream and skim milk (obtained from whole milk) so that the milk's "percentage" (i. e., butter-fat content) meets the minimum requirements of state law (*ibid.*). Addition of vitamins, such as vitamin "D", increases com-

ponents already present in the milk and improves the milk somewhat (*ibid.*).

The Commission has ruled that milk which has been subjected to all of this processing is not a "manufactured" product within the meaning of the "agricultural" exemption. *Determination* case, *supra*, p. 551. Its conclusion was that such processing does not change the "basic character" of the milk "in any material respect", and that it continues to have "the same beneficial uses as theretofore" (*ibid.*). We submit that, by these same tests, removal of the feathers and entrails of poultry does not make it "manufactured."

In *Interstate Commerce Commission* v. *Allen E. Kroblin, Inc.*, 113 F. Supp. 599 (N. D. Iowa), the court held, after an exhaustive review of the legislative history of Section 203 (b) (6), that dressed poultry is not "manufactured" and that vehicles carrying it are therefore within the exemption given by the section. On appeal, this decision was affirmed (212 F. 2d 555 (C. A. 8)), and certiorari was denied (348 U. S. 836). The appellate court said, 212 F. 2d at 557:

> And, within the realities of marketing and distributing poultry, the dressing thereof at the local market level would seem to be no more of a step in the disposing of it as poultry than would the pasteurizing of milk or the ginning of cotton in disposing of them as milk and cotton. * * * The position of the Commission in its naked effect—though not thus baldly phrased—is

> simply that, as a matter of giving motor-carrier regulation as full a scope as possible, a chicken should be regarded as being converted into a manufactured product whenever its head has been cut off. Neither the language nor the spirit of the agricultural exemption warrants us in adopting any such artificial concept * * *.

The position of the Commission respecting dressed poultry, maintained in the face of the adverse *Kroblin* case, is not unlike the position which it took in *Interstate Commerce Commission* v. *Love*, 77 F. Supp. 63 (E. D. La.), that the exemption of "fish" in Section 203 (b) (6) applies only to fish "as taken from the water" and therefore does not embrace fresh or frozen beheaded shrimp. The court, however, held that shrimp, packed in ice or frozen after removal of their heads, "continue to be shrimp in their natural state" and thus within the exemption conferred as to "fish". 77 F. Supp. 67. The court of appeals affirmed *per curiam*. 172 F. 2d 224.

Mitchell v. *Myrtle Grove Packing Co.*, 350 U. S. 891, gives no support to appellants' contention that dressed poultry is a "manufactured" product. In that case this Court, "agreeing with the construction of the Fair Labor Standards Act given it by the Fourth Circuit Court of Appeals in *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245", reversed *per curiam*. The construction thus approved was that picking meat from the claws of crabs when this was "an essential and inte-

grated[,] step in the continuous and uninterrupted process of canning crabmeat" was "canning" within the purview of Section 13 (b) (4) of the Act, and not "processing (other than canning)" within the terms of Section 13 (a) (5). 198 F. 2d 248. This is a holding, not that picking meat from crab shells is canning, but that, under the applicable sections of the statute, the word "canning" embraces necessary and closely integrated preparatory operations.[14]

C. The Commission's ruling that dressed poultry is not within the exemption given by Section 203 (b) (6) is not determinative, or even persuasive, of the scope and application of the section

The Commission has never faced the real issue—whether poultry, upon being killed and dressed, becomes "manufactured". Its conclusion as to dressed poultry was based on the following reasoning: The products for which exemption is given include "ordinary livestock", and these words do not embrace meats resulting from slaughter of livestock. Since the exemption given as to cattle, sheep, swine, etc., when alive, does not extend to meats derived from their slaughter, it "logically follows" that the exemption which poultry has when alive does not extend to poultry when killed (R. 44–45).

We submit that this reasoning is circular. It might just as well be said that since poultry,

[14] Legislative history expressly confirmed this interpretation, and it had the support of long standing, consistent administrative interpretation. See Government's brief in No. 44, October Term, 1955, pp. 13–14, 17–18.

whether alive or slaughtered, is within the Section 203 (b) (6) exemptions, it "logically follows" that livestock, whether on the hoof or after slaughter, is within these exemptions.

The Commission did not relate its conclusion to the words of the statute or to its legislative history. Its speculative deduction of congressional intent rests on the false premise that the statutory provisions pertinent to exemption of meats and those pertinent to exemption of dressed poultry are parallel. On the contrary, the exemption granted "agricultural commodities" includes processed commodities provided they are not "manufactured", but the "ordinary livestock" exemption, by its express terms, does not include processed livestock. This difference in the scope of the two exemptions is not to be ignored on the basis of what the Commission or the courts believe to be "logical".[15]

The Commission contends that its ruling should be upheld because an administrative agency's interpretation of a statute which it has the duty to enforce is entitled to "special consideration". The issue presented is the statutory authority of the Commission to forbid motor transportation

[15] Possibly Congress believed it appropriate to distinguish between products which had been processed without effecting any substantial change in the products' original identity, as in the case of dressed poultry, pasteurized milk, ginned cotton, etc., and processed products where there was no such continuing substantial identity. Certainly a cut of fresh pork, a sirloin steak, or a lamb chop is not bought or sold as a pig, a steer, or a lamb.

of dressed poultry by an uncertificated carrier. Administrative practice and rulings "cannot narrow the scope of a statute when Congress plainly has intended otherwise" (*Neuberger* v. *Commissioner*, 311 U. S. 83, 89), and an administrative agency "may not finally decide the limits of its statutory power" (*Social Security Board* v. *Nierotko*, 327 U. S. 358, 369). In addition, the weight to be given to administrative interpretation depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control" (*Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140).

By the tests suggested in the *Skidmore* case, the Commission rulings relied upon by the appellants in No. 162 are not persuasive. To the limited extent that the Commission has dealt with the application of Section 203 (b) (6) to dressed poultry, there has been no consistency in reasoning, but rather a shift from one vulnerable position to another.

We find no reported Commission rulings on the exempt status of transportation of dressed poultry prior to the *Kroblin* case, *supra*, other than the *Determination* case, *supra*, and certain rulings in *Monark Egg Corp. Contract Carrier Application*.[16]

[16] The brief for appellants in No. 162 also cites (p. 37) *Battaglia Common Carrier Application*, 18 M. C. C. 167;

The first *Monark* report considered live poultry to be within the words "ordinary livestock", and ruled that dressed poultry was not an exempted commodity because not livestock. 26 M. C. C. 615, 618. The second *Monark* report rejected this view, and adopted the channel-of-commerce theory of the scope of the exemptions granted, that is, that transportation of farm products was exempted only "to the point where they first entered the channels of ordinary commerce", a theory which put dressed poultry outside the exemption. 44 M. C. C. 15, 18–19. This channel-of-commerce theory was, in turn, rejected in the third and fourth *Monark* reports (49 M. C. C. 693, 698; 52 M. C. C. 576, 581) and also in the *Determination* case (52 M. C. C. 511, 524). In the latter case, as in the instant case, the ruling was that, since meats are not an exempted commodity, it "logically follows" that dressed poul-

Allen Common Carrier Application, 28 M. C. C. 26; and *McCarty Contract Carrier Application*, 32 M. C. C. 615. In *Battaglia* a recommended report and order by a joint board (see Sec. 205 (a)–(b) of the Act, 49 U. S. C. 305 (a)–(b)) automatically became effective because no exceptions thereto were filed. In the *Allen* and *McCarty* applications the applicants' operations included transportation of dressed poultry and the requested certificates of operating authority were granted. The Commission acted upon the basis—subsequently overturned (see n. 9, p. 15, *supra*)—that transportation of any non-exempt commodity "subjects all of his [the applicant's] for-hire motor-vehicle operations" to the certificate provisions of the Act. 28 M. C. C. 27. The Commission therefore did not have to determine, nor did it determine, whether Section 203 (b) (6) exempts transportation of dressed poultry.

try is not an exempted commodity. *Supra*, p. 23. And the Commission's position in the *Kroblin* case, which the Court of Appeals for the Eighth Circuit held to be erroneous, can hardly lend support to the order which is now in issue.

Congress, in exempting particular transportation from the Act's general regulatory provisions, did not authorize the Commission to determine the scope of exemption by balancing the need for effective regulation against the interests of those intended to be benefited by exemption. Moreover, the Commission's dressed-poultry ruling was put on purely legalistic grounds, not on the Commission's special knowledge of transportation problems.[17]

It is of some significance that nearly all of the judicial decisions dealing with Section 203 (b) (6) have held that the Commission has placed a too narrow interpretation on the scope of the exemptions given by this section. It was so held in the *Love* and *Kroblin* cases. See *supra*, pp. 21–22. In *Interstate Commerce Commission* v. *Yeary Transfer Co.*, 104 F. Supp. 245 (E. D. Ky.), affirmed, 202 F. 2d 151, the court held, contrary to the Commission's contention, that artifi-

[17] The Commission, in effect, treated as irrelevant contrary scientific evidence. It affirmed its ruling in the *Determination* case, where the "scientist" testifying with respect to poultry had expressed the opinion that the processing, including freezing, by which poultry is prepared for marketing as dressed poultry, is not "manufacturing". 52 M. C. C. at 544.

cially redried tobacco is not a "manufactured" product. *Interstate Commerce Commission* v. *Wagner*, 112 F. Supp. 109 (M. D. Tenn.), rejected the Commission's contention that scoured wool, which had been washed through many vats of detergent, rolled in mechanical rollers and then dried, was manufactured and hence not an exempted commodity. *Florida Gladiolus Growers Assn.* v. *United States*, 106 F. Supp. 525 (S. D. Fla.), where the proceeding was instituted prior to the 1952 amendment adding the words "including horticultural", the court held, contrary to the Commission's ruling, that cut flowers are "agricultural commodities".[18]

Appellants rely to some extent upon the fact that the Commission's report refers to certain Government publications which include the dressing of poultry or dressed poultry under a general list of manufacturing industries or manufactured products (R. 43). Since the proof does not show, nor did the Commission consider, the criteria employed in making these general classifications, the lists provide no guidance in determining the meaning of the word "manufactured" as used by Congress in limiting the statutory exemption given to vehicles carrying agricultural commodities.

[18] Other decisions holding that the Commission's interpretation of Section 203 (b) (6) had been too restrictive are *Interstate Commerce Commission* v. *Dunn*, 166 F. 2d 116 (C. A. 5) and *Interstate Commerce Commission* v. *Service Trucking Co.*, 186 F. 2d 400 (C. A. 3).

Cf. *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 74–75. The essential irrelevance of these listings is highlighted by the fact that in two of them both dressed poultry and milk "(Fluid Market)" are included under the heading "Food, Manufactured" (Ex. 13, R. 132; Ex. 15, R. 139).

We finally note that the appellants in Nos. 162, 163, and 164 do not urge that there is any distinction between fresh dressed poultry and frozen dressed poultry with respect to the application of Section 203 (b) (6). The *Love* case, *supra*, specifically held that the exemption for "fish" equally covers fresh fish and frozen fish. 77 F. Supp. 63, 68. And in the fourth report in the *Monark* application the full Commission reached the same conclusion, and stated that frozen fish "remain in their natural or fresh state", with the freezing merely arresting deterioration while the commodity remains under refrigeration. 52 M. C. C. 576, 580. For like reasons, fresh dressed poultry and frozen dressed poultry are in the same category for the purposes of the exemption conferred by Section 203 (b) (6).

CONCLUSION

For the foregoing reasons, the judgment of the district court which is attacked in the appeals taken in Nos. 162, 163, and 164 should be affirmed.

Respectfully submitted.

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APPENDIX

Excerpts from Opinion in *Prentice* v. *City of Richmond*, Decided by Virginia Supreme Court of Appeals January 16, 1956

* * * The sole issue is whether Prentice as a poultry processor was a "manufacturer" in the City during 1953 and therefore exempt from a wholesale merchants' license tax levied by the City for that year.

There is no conflict in the evidence. Prentice's business operation consists of the buying, killing, cleaning, chilling, and the sale and delivery of poultry to various wholesalers and jobbers. * * *

* * * * *

On arrival at the plant the live poultry is hung at nine inch intervals on a moving overhead conveyor which travels at the rate of 18 feet per minute. It is then hand-killed, dipped into a tank of hot water to loosen the feathers, and passed through a machine which removes all but the pin feathers, which are removed by hand. Further along the conveyor line the poultry is eviscerated and hand-cleaned, thoroughly washed and the edible parts reinserted in the carcass, which is then graded by weight and quality, sorted and chilled. Twenty-four carcasses come off the conveyor as dressed poultry each minute of working time, with the entire operation, exclusive of chilling, taking about 15 minutes. After chilling in crushed ice, 25 carcasses are placed in wooden containers lined

with waxed paper and iced further while awaiting sale.

In support of the contention that he is a manufacturer and therefore exempt from the City's wholesale license tax, Prentice argues forcefully for a quantitative definition of manufacturing, that is, the same operational undertaking is or is not manufacturing depending on the relative importance of mechanical devices or machinery used in the process of turning out a particular finished product. * * * The City argues on the other hand that Prentice has overstressed the quantitative element in manufacturing and underemphasized the qualitative factor of change or transformation of the original ingredient as required by the Virginia cases. * * *

* * * * *

The next case to come before this court involving the meaning of manufacturing for purposes of taxation was *Richmond* v. *Richmond Dairy Co., supra* [156 Va. 63]. * * * After reviewing more than a dozen cases, the court held, speaking through Chief Justice Prentis, that the business of buying fluid milk, pasteurizing and selling it as fluid milk and cream was not manufacturing. * * *

* * * * *

The most recent case to come before the court was *Commonwealth* v. *Meyer, supra* [180 Va. 466], which involved both a state and a city merchants' license tax. Meyer, a meat packer, was engaged in the business of purchasing hogs and cattle on the hoof, slaughtering and processing them and selling the meat products. In the course of this operation the carcasses of the hogs were

carved into hams, shoulders and middlings and what was left was made into sausage, lard, etc. The hams and shoulders were tenderized, salted, smoked and cured and after the expiration of about 10 days they were wrapped for sale with their weight noted on the package. The middlings were sliced into breakfast bacon and packaged for sale. The court considered but rejected the stricter Pennsylvania rule that meat packers are not manufacturers and held that Meyer's operation involved sufficient transformation of the original ingredients to meet the definition of manufacturing. In so holding, Justice Holt, later Chief Justice, reviewed the Virginia cases and noted that the *Morris* case [116 Va. 912] quoted with approval the definition of "manufacturer" and "seller" contained in the *Consumers' Brewing Co.* case [101 Va. 171]. Commenting on the process of pasteurization as applied to milk, cream and buttermilk in the *Richmond Dairy* case, the opinion points out that: "These articles are not changed. They taste the same, and they look the same." And in discussing *Engle v. Sohn, supra* [41 Ohio St. 691], where a pork packer was held to be a manufacturer, the court said: "By the use of divers instrumentalities the original substance, though not destroyed, was transformed into shapes which could scarcely be recognized." In concluding its opinion the court recognized that there must be a substantial change or transformation of the original article when it said:

> A hog on the hoof put through plaintiffs' packing plant is no longer a hog. It comes out as hams, shoulders, middlings,

> sausage, souse, chitterlings, and other articles of commerce fit for consumption. Its value is increased. The color of this ham is changed; its texture is changed; its taste is changed; putrefaction is prevented, and it may be kept wholesome for an indefinite time. * * * 180 Va., at page 473.

* * * * *

While we agree with Prentice that the elements of his quantitive definition of manufacturing should receive consideration in determining whether a particular processing operation constitutes manufacturing within the meaning of the tax ordinance, we are of the opinion that in his processing operation the necessary qualitative element of manufacturing is lacking. There is no change or transformation of the live poultry into an article or product of substantially different character; slaughtering poultry, picking and cleaning it does not constitute such change as is essential to manufacturing. It follows therefore that Prentice is not a manufacturer but a wholesale merchant subject to the City tax assessment.

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